STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2008
v ELGIE SANTINO GRAYS, Defendant-Appellant.	No. 277866 Wayne Circuit Court LC No. 06-008306-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DAVID CURRIE, JR., Defendant-Appellant.	No. 278072 Wayne Circuit Court LC No. 06-008305-01

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In this consolidated appeal, defendants Elgie Santino Grays and David Currie were convicted by separate juries for charges arising from a crime spree targeting various motorists early in the morning of April 28, 2006 on the west side of Detroit. Grays was convicted of one count of second-degree murder for the murder of Officer Charles Phipps, MCL 750.317, one count of first-degree felony murder for the murder of Phipps, MCL 750.316(1)(b), one count of carjacking of John Feazell, MCL 750.529a(1), three counts of armed robbery for the robberies of Feazell, Marie Leinonen, and Dewayne Smith, MCL 750.529, one count of assault with intent to murder Leinonen, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f(3), and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). Currie was convicted of one count of carjacking of Feazell, MCL 750.529a(1), three counts of armed robbery for the robberies of Feazell, Leinonen, and

Smith, MCL 750.529, one count of assault with intent to murder Leinonen, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f(3), and one count of felony-firearm, MCL 750.227b(1).[1]

The trial court sentenced Grays as a fourth habitual offender, MCL 769.12, to concurrent sentences of life imprisonment for each murder conviction and 420 to 700 months' imprisonment for each carjacking, armed robbery, assault with intent to commit murder, and felon in possession of a firearm conviction, and a consecutive sentence of two years' imprisonment for the felony-firearm conviction. The court sentenced Currie as a third habitual offender, MCL 769.11, to concurrent sentences of 35 to 70 years' imprisonment for each carjacking, armed robbery, and assault with intent to commit murder conviction and five to ten years' imprisonment for the felon in possession of a firearm conviction, and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction.[2] Defendants appeal as of right. We affirm.

I. Ineffective Assistance of Grays' Counsel

Grays claims that he was denied the effective assistance of counsel at trial. We disagree. Our review of a claim of ineffective assistance of counsel is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *Id.* We review the trial court's factual findings for clear error and its constitutional determinations de novo. *Id.* at 484–485.

Grays claims that prejudice is presumed with regard to his ineffective assistance claims because his counsel was not present for the jury instructions; rather, substitute trial counsel represented him. Although prejudice is presumed when "the accused is denied counsel at a 'critical stage' of the proceedings," *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), substitute counsel was present for the jury instructions. Therefore, Grays was not completely denied counsel during this stage of the proceedings and prejudice is not presumed.

---

[1] Jason Treadwell and Brion McConnell were also charged in relation to this crime spree. McConnell pleaded guilty to second-degree murder, armed robbery of Feazell and Leinonen, and felony-firearm. Treadwell was tried separately and was convicted of first-degree premeditated murder, first-degree felony murder, assault with intent to rob while armed, carjacking, two counts of armed robbery, assault with intent to commit murder, felon in possession of a firearm, and felony-firearm. In a separate opinion, we affirmed Treadwell's convictions. *People v Treadwell*, unpublished opinion per curiam of the Court of Appeals, issued July __, 2008 (Docket No. 277363).

[2] Initially, Grays and Currie were also charged with three counts of assault with intent to rob Phipps, Myra Andrews, and Roland Wellborn while armed, MCL 750.89. However, these charges were dismissed before trial.

In this case, effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Grant, supra* at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show (1) that his attorney's performance fell below an objective standard of reasonableness and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant, supra* at 485–486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for his attorney's errors. *Id.* at 486.

Grays claims that his substitute trial counsel was ineffective because she failed to challenge the trial court's omission of second-degree murder as a necessarily included lesser offense of first-degree felony murder. An instruction on second-degree murder as a necessarily included lesser offense of first-degree murder is automatically required "if the intent element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder." *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).

In this case, the intent element differentiating first-degree felony murder and second-degree murder was not at issue. Instead, Grays' defense was that he was simply not involved in the crime spree. Therefore, the trial court was not automatically required to provide an instruction regarding second-degree murder as a necessarily included lesser offense of first-degree felony murder. *Id.* at 358 n 13. Grays has failed to overcome the strong presumption that substitute trial counsel's decision not to challenge the instructions and request an instruction on second-degree murder was sound trial strategy. *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986) (trial counsel's decision not to request instructions on lesser-included offenses can constitute sound trial strategy because such instructions may reduce the chance of acquittal).

Following deliberations, Grays' jury returned a sealed and signed verdict to the trial court because defendant Currie's jury was still in deliberations. The trial court polled the jury and sent it back to the jury room for the trial court to "give you some things, and then we'll be free to go." Thirty-two minutes after they were sent back to the jury room, the trial court reconvened the jury for further deliberations regarding the first-degree felony murder charge. The trial court informed the jury that it mistakenly omitted an instruction regarding second-degree murder as a lesser-included offense of first-degree felony murder. The trial court ordered the jury to return to deliberations to decide if it wished to maintain its first-degree felony murder conviction or to find Grays guilty of second-degree murder. When the jury returned, it presented the same first-degree felony murder sealed verdict and was discharged.

Defendant contends that because jeopardy had already attached, his trial counsel was ineffective for failing to object when the trial court reconvened the jury. In *People v Rushin*, 37 Mich App 391, 398–399; 194 NW2d 718 (1971), this Court held that once a jury departs from the courtroom and has been officially discharged, its legal duties cease and "it is error to recall it in order to alter, amend or impeach a verdict in a criminal case." *Id.* at 398. In *Rushin*, after the jury acquitted the defendants, it was discharged from further consideration and sent to the jury room. *Id.* at 393. In response to a juror's communication to the court reporter that the verdict was not unanimous, the trial court reinstated and polled the jury two minutes later. *Id.* at 394. The jury was ordered to continue to deliberate but could not agree on a verdict, and a mistrial resulted. *Id.* The defendants were convicted after a second trial. *Id.* Although the time between discharge and reinstatement was only two minutes and the jury had been insulated from outside

influences in the jury room, the *Rushin* Court noted that there was still a hazard of suspicion because the jurors, however briefly, had left the presence of the court. *Id.* at 397–399. Therefore, the *Rushin* Court held that the first jury's initial verdict acquitting the defendants was final and reversed the defendants' subsequent convictions and sentences. *Id.* at 399–400.

Generally, a verdict must be announced in open court before it may be considered final. MCR 6.420(A). The procedure in Grays' case is unique because the jury rendered a sealed verdict, which was not announced in open court. "Permitting the jury to seal its verdict before separation assures the verdict's propriety without needless waiting at the courthouse by the litigants, counsel, and court officials for reception of the verdict." 75B Am Jur 2d, Trial, § 1522, p 314. Like the rule set out in *Rushin* for the alteration, amendment, or impeachment of a verdict in open court, "[w]here the jury in a criminal trial has sealed its verdict and separated, it cannot, upon returning into court, amend or correct it in matters of substance." 75B Am Jur 2d, Trial, § 1623, pp 415–416.

Following *Rushin*, trial counsel could have successfully challenged the recall of the jury because the jurors departed the courtroom and were discharged of their duties and there is a hazard or suspicion that the jury was exposed to outside influences in the 32-minute interval before it was reconvened. Nevertheless, Grays was not so prejudiced that he was deprived of a fair trial. The jury's original verdict finding Grays guilty of first-degree felony murder was consistent with its subsequent verdict. Therefore, despite the reconvened deliberations and the trial court's alteration of the instructions, there is no reasonable probability that the outcome would have been different but for trial counsel's failure to object.

II. Grays' Motion to Sever

Next, Grays argues that the trial court abused its discretion when it denied his motion to sever the charges regarding Phipps' murder from the charges regarding offenses against Feazell, Smith, and Leinonen. We disagree. We review a trial court's ultimate decision to deny a motion to sever for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

A criminal defendant is entitled to separate trials on unrelated offenses pursuant to MCR 6.120(B). *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690 (1992), mod 441 Mich 867 (1992). "Joinder is appropriate if the offenses are related." MCR 6.120(B)(1). "Offenses are related if they are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan."[3] *Id.* Joinder is also

[3] This Court has noted,

> "'[S]ame conduct' refers to multiple offenses 'as where a defendant causes more than one death by reckless operation of a vehicle.' 'A series of acts connected together' refers to multiple offenses committed 'to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery.' 'A series of acts . . . constituting parts of a single scheme or plan' refers to a situation 'where a cashier made a series of false entries and reports to the commissioner of banking, all of

(continued…)

appropriate for offenses within a close time-space sequence, such as offenses occurring within an hour-and-a-half and having arisen from substantially the same transaction. *Id.* at 510.

In this case, the offenses against Feazell, Smith, Leinonen, and Phipps occurred between 3:00 a.m. and 3:35 a.m. on the same morning. Furthermore, the offenses each occurred within several blocks on the west side of Detroit. Brion McConnell, who was also involved in the crime spree, testified that the men were looking for money. In each offense, the assailants drove a vehicle resembling McConnell's aunt's Honda CRV and targeted motorists for their valuables. Feazell, Smith, and Leinonen testified that their assailants pretended to be police officers and carried guns. Smith and Leinonen also testified that the assailants hit them in the head. The motorists described the number of assailants and their physiques similarly. In sum, these offenses occurred within a close time-space sequence and arose from substantially similar transactions. In addition, joinder was in the interest of judicial economy because many witnesses would overlap. The trial court's denial of the motion to sever was not an abuse of discretion because it fell within the range of principled outcomes.

III. Ineffective Assistance of Currie's Counsel

Currie claims that his trial counsel was ineffective for failing to call him to testify at the *Walker*[4] hearing regarding the motion to suppress his statements to police, in which he admitted to participating in the crime spree. We disagree.

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). See *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The court determines whether a statement was voluntary by examining the totality of the circumstances to determine whether the confession was freely and voluntarily made. *People v Shipley*, 256 Mich App 367, 374; 662 NW2d 856 (2003). Factors to consider include the following:

> "[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement;

(…continued)

> which were designed to conceal his thefts of money from the bank.'" [*Daughenbaugh, supra* at 509–510, quoting *People v Tobey*, 401 Mich 141, 151–152; 257 NW2d 537 (1977).]

[4] *People v Walker* (*On Rehearing*), 374 Mich 331, 338; 132 NW2d 87 (1965) (when a defendant challenges the admissibility of his statements, the trial court must hear testimony regarding the circumstances of the statement outside the presence of the jury).

> whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse." [*Id*. at 373-374, quoting *People v Sexton* (*After Remand*), 461 Mich 746, 753; 609 NW2d 822 (2000).]

An officer's misrepresentation does not render a defendant's confession inadmissible per se. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). The prosecutor has the burden to show by a preponderance of the evidence that the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000).

On appeal, Currie does not specifically allege the circumstances that made his statement involuntary. Nevertheless, Currie's motion before the trial court alleged that the statement was involuntary because (1) the police repeatedly questioned him after he asserted his rights to silence and counsel, and (2) he was advised that if he did not sign the statement that he made, his mother would be arrested for murder. The interrogating officers, Lance Sullivan and Scott Shea, presented conflicting testimony at the *Walker* hearing that Currie's rights were protected and he was not threatened, thereby creating a credibility contest between the officers and Currie's allegations.

Even if trial counsel's failure to call Currie to testify regarding these allegations fell below an objective standard of reasonableness, the performance did not so prejudice him that he was deprived of a fair trial. *Grant*, *supra* at 485–486. Absent his confession, there was sufficient evidence that Currie was an assailant in this crime spree. McConnell stated that the men were looking for money that morning. The evidence placed Currie with McConnell, Treadwell, and Grays in a Honda CRV in the neighborhood where and when the crime spree occurred. In addition, Feazell testified that Currie pointed a gun at him from the passenger side of the CRV during the robbery and carjacking. Thus, we conclude that Currie has not demonstrated a reasonable probability that the outcome would have been different but for trial counsel's errors.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis